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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937-8.

Nos. 715 and 716

IN THE MATTER OF JAMES M. WRIGHT, DEBTOR.

JAMES M. WRIGHT,
Petitioner (Appellant),

vs.

UNION CENTRAL LIFE INSURANCE CO.,
Respondent (Appellee).

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT (APPELLEE).

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT (APPELLEE).

STATEMENT.

Appellant's "Statement of the Case" omits the factual matters essential to a proper consideration of this case and an intelligent conclusion with respect thereto. It is desired to point to these matters, avoiding, as far as possible, the few facts which have been set forth. We are forced to a more extended statement by reason of Appellant's basic omissions and erroneous assumptions.

(1) Prior to the filing on October 29, 1934 of Appellant's petition for relief under Section 75 of the

Bankruptcy Act, Appellee had filed its actions for the foreclosure of mortgages owned by it on the 280 acres in question. Both mortgages had run since 1925 and both were in default long before said petition was filed. One was for $3,000.00 secured by 80.31 acres in Section 4, and the other for $9,000.00 on the 200-acre tract in Section 31, in Jay County, Indiana. The two pieces constituted and were operated as one farm. (R. 2, 4 and 8.)

(2) At the time Appellant filed his original petition, he included in his schedules, filed in connection therewith, the 280.31 acres above referred to (R. 26), although at that time Appellant *did not own this land.* (R. 24.)

(3) It is important to note that Appellant filed his original petition under Section 75 on October 29, 1934; that subsequently, on December 19, 1934, he abandoned his quest for relief by way of composition or extension, and, representing that no agreement of creditors could be had, filed his amended petition under the original Frazier-Lemke Amendment (Subsection (s) of Section 75). (Sec. 75 of Bankr. Act, as Am. Mar. 3, 1933; 47 Stat. 1470.)

(4) On October 14, 1931, Appellant had executed, delivered and recorded a warranty deed to the 80.31-acre tract to Walter C. Wright, reciting a valid consideration and made subject to Appellee's said $3,000.00 mortgage. (R. 22, 26 and 27.)

Also, on October 14, 1931, he had conveyed to Emma G. Wright, his wife, John E. Coon and Edna E. Coon, respectively, 40 acres each of the other 200-acre tract. Each deed recited a valid consideration, was duly recorded and was made subject to a proportionate share of Appellee's mortgage. (R. 23, 28, 29, 30 and 31.)

(5) In the foreclosure proceeding covering the 80.31-acre tract, a final decree of foreclosure was entered in the Circuit Court of Jay County, Indiana, on June 9, 1934, the Appellant and his grantee, Walter C. Wright, the then owner, being parties defendant to said action and said decree.

(6) On July 12, 1934, said 80.31 acres were duly sold by the Sheriff of said County as ordered by said decree, and Appellee, being the purchaser thereof, received a duly executed certificate of sale for said property. (R. 63.)

(7) On April 13, 1935, Appellant received a deed back from his grantee, Walter C. Wright (R. 24), who then owned only his right of redemption from said sale.

(8) On August 2, 1935, the statutory period for the redemption from said sale having expired July 12, 1935, and, no redemption having been made, Appellee received a final deed conveying absolute title to said 80.31 acres. (R. 63.)

(9) On September 13, 1935, Appellee brought an action in ejectment for the possession of this property (R. 63), obtained a judgment as prayed and the same subsequently was affirmed by the Supreme Court of Indiana (R. 64) on appeal of *all* parties defendant therein. (Appendix II.)

(10) On October 11, 1935, Appellant amended his petition under amended sub-section (S) of Section 75, as amended August 28, 1935, (Title 11 U. S. C. A., Sec. 203); and contends that, as to this 80.31 acres, he is entitled to relief thereunder, despite the fact that Appellee then held absolute title to this tract and the right to the possession thereof.

(11) As to the property he had conveyed from the 200-acre tract in October, 1931, Appellant did not receive reconveyances until April of 1935. (R. 24.) Prior to that date (and prior to the filing of Appellant's petition under the original sub-section (S)), foreclosure had been started by Appellee and on May 27, 1935, a final decree of foreclosure and a personal judgment for $11,975.11 against Appellant were entered in said Jay Circuit Court. (R. 24.) Appellant and his surviving grantees of October, 1931 (as owners), were parties defendant to said foreclosure action and decrees. (R. 24-5.)

(12) On July 20, 1935, said 200 acres were duly sold by said Sheriff, as ordered by said decree, and Appellee, being the purchaser thereof, received a duly executed certificate of sale for said property. (R. 25.)

(13) On July 20, 1936, the statutory period for the redemption from said sale expired and, no redemption having been made, Appellee received a final deed conveying absolute title to said 200 acres. (R. 25.)

(14) The only order of the District Court covered by Appellant's first appeal #715 herein was the or-

der of December 14, 1936 whereby the District Court declined to review, but approved the recommendation of the Conciliation Commissioner that the above mentioned 280.31 acres be stricken from Appellant's schedules filed with his original petition on October 29, 1934. (R. 42) (being the only schedules filed by him.) Said appeal was prayed and allowed on December 23, 1936. (R. 44)

(15) On December 23, 1936, Appellant made written application for leave to amend his schedules A1 and B2 (as filed with his original petition in bankruptcy on October 29, 1934) so as to include the above described 280.31 acres which he did not own when said original petition was filed, but which had since been reconveyed to him. (R. 2.)

NOTE: This was the first effort made by Appellant to include this property in his schedules or to submit the same to the jurisdiction of the Federal Court for relief under the Bankruptcy Act, *at any time while he was the owner thereof.*

(16) The foregoing application for leave to amend said schedules made no mention of the previous order striking this property from said schedules, did not purport to have been made necessary by said order and made no attempt to preserve any questions or rights under or in connection with said order. (R. 2-3.)

(17) When, on December 31, 1936, the District Court denied leave to amend said schedules (R. 9) he prayed an appeal therefrom (#716 herein) and filed his Assignment of Errors therewith. Said appeal referred only to said order of December 31, 1936 and in said Assignment of Errors no point was made and no question raised as to the previous order of December 14, 1936.

(18) In amended schedule A-2 sought to be filed by Appellant on December 23, 1936, his aggregate indebtedness to Appellee, secured by said 280.31 acres is stated as $12,000.00 and interest. (R. 4.) In amended schedule B-2, his own estimate of the value of said property was $10,845.00.

QUESTIONS PRESENTED.

Appellant's statement of Questions Presented on pages 4 and 5 of his brief is inaccurate and misleading, each question being based upon a false premise of fact and law. The same errors of assumption are apparent throughout Appellant's brief.

As to Appellant's question (a):

Appellant was not the owner of the 200-acre tract when his petition in bankruptcy was filed and could not then submit same to the jurisdiction of the Federal Court. No effort was made to bring it within such jurisdiction until December 23, 1936, at which time Appellee held absolute title.

If, without a then amendment of said schedules, said 200 acres can be said to have been submitted to the Court by virtue of the enactment of amended sub-section (S) on August 28, 1935, or the amendment of Appellant's petition thereunder on October 11, 1935, it must be observed that on such dates a sale of said property, under final decree of the State Court, had been had on July 20, 1935 and the period of redemption had then begun to run.

The questions presented for review herein as to said 200-acre tract are, therefore:

First. Was this property *ever* within the jurisdiction of the District Court under amended sub-section (S)?

Second. If so, it must have been after the sale and after the period of redemption had begun to run. In this event, has Congress power to authorize the District Court to nullify the previous decrees and sales in the State Court, the rights of the purchaser (Appellee) acquired thereunder, to order a re-sale and to utterly destroy the period

of redemption, at the expiration whereof the purchaser would be entitled to absolute title?

Third. Was not the doctrine of *Lafayette Etc. Co.* v. *Lowmon,* 79 F. (2d) 887 properly applied by the Circuit Court of Appeals herein, rather than the decision of *Wright* v. *Vinton Branch, etc.,* 300 U. S. 440, wherein no final decree of a State Court and no sale pursuant thereto had been had, no rights of a mortgagee-purchaser had attached and no period of redemption had started to run?

As to Appellant's question (b):

Appellant was not the owner of the 80.31-acre tract at the time his petition in bankruptcy was filed nor, at that time, had the right of redemption been conveyed to him by his former grantee. Between the time the right of redemption was conveyed to Appellant on April 13, 1935, and the time Appellee acquired absolute title on August 2, 1935, no effort was made to submit the property or right of redemption to the jurisdiction of the Federal Court. The only questions presented as to this tract are, therefore:

First. By the terms of amended sub-section (S) did its enactment on August 28, 1935 or the amendment of Appellant's petition for relief thereunder on October 11, 1935, operate to bring within the jurisdiction of the District Court property (or any right to redeem same) to which Appellee had acquired absolute title on August 2, 1935?

Second. If such result was intended or effected by the terms of the Act, did Congress have the power to so legislate?

SUMMARY OF ARGUMENT.

I.

All vested property rights, titles to land and rules of alienation and transfer thereof involved herein, must be determined by the laws of the State of Indiana and the settled adjudications of its Courts. The Federal Courts are bound thereby. The law of the State governs in determining what property, or interest therein, was owned by Appellant, as the bankrupt, at the time his petition in bankruptcy was filed and consequently, what property or interest passed to the jurisdiction of the Federal Court by virtue of the petition in bankruptcy.

(a) To deny the effect of a decree of a State Court affecting real estate is to deny that the law of the State governs in such case.

(b) The test of whether property passes to the jurisdiction of the Bankruptcy Court, under Section 70 of the Bankruptcy Act, is whether it could have been transferred by the bankrupt or levied upon and sold under judicial process against him and must be determined by the local law.

(c) Property acquired by the bankrupt subsequently to the filing of his petition is not thereby submitted to the jurisdiction of the Bankruptcy Court.

(d) The mere inclusion in the bankrupt's schedules, of property not owned by him, cannot effect a submission of same to the Bankruptcy Court.

(e) Decisions of the Indiana Courts (including its Supreme Court, whose opinions are attached as Appendices II and III), have fixed the rights of these same parties

to the identical property involved herein and jurisdiction of said Courts has been accepted and urged by Appellant in the present proceedings.

(f) Title to property involved could not be conferred upon Appellant by waiver of Appellee. Title is a jurisdictional element. In any event, the previous actions and attitude of Appellee in the litigation concerning this property are wholly inconsistent with any thought of waiver.

II.

Under the law of Indiana and the settled adjudications of its Courts, and applying the test of the Bankruptcy Act, Appellant did not own the property involved herein at the time he filed his original petition in bankruptcy and could not submit same to the Federal Court for administration under the Bankruptcy Act.

(a) The conveyances whereby Appellant divested himself of title to the property in question prior to the filing of his original Petition in Bankruptcy were valid under the laws and decisions of Indiana.

(b) The decrees of foreclosure in the Circuit Court of Jay County, Indiana determined the rights of the parties herein to and in the real estate involved and ordered sales thereof pursuant to the law of Indiana. Thereby Appellee's rights under the notes and mortgages were merged into the decrees and by the sales became vested pursuant to the laws of Indiana.

(c) The sales of these tracts of land were had pursuant to final decrees of the State Court and as provided by the Statutes of Indiana, and Appellee received Certificates of Sales as purchaser thereunder.

(d) Under the Indiana law the period of redemption from each sale expired one year from the date of said sale,

and, there being no redemption, the deeds executed by the Sheriff of Jay County and delivered to Appellee vested it with absolute title to the land.

(e) Amended sub-section (s) cannot be applied without holding that nullification of the above established rights by the Bankruptcy Court was proper.

III.

The major premise of Appellant's brief and claim for relief herein is expressed in his Points 3(c), 3(e) and 3(f), dealing with the exclusive jurisdiction provision of Section 75. It is unsound because,

(a) The Bankruptcy Court could acquire no jurisdiction over land not owned by him;

(b) At the time amended (s) was enacted, Appellant had no proceeding pending except, possibly in general bankruptcy, wherein the exclusive jurisdiction element is not involved; and

(c) He did not attempt to submit this land to the jurisdiction of the Bankruptcy Court until *after* Appellee had absolute title to both tracts. His motion to amend his schedules at that time inferentially so admitted and also waived all questions involved in the appeal previously prayed by him.

IV.

Appellant has shifted from the position taken by him in the Courts below. There he claimed that the Bankruptcy Court acquired jurisdiction of the real estate by and *at the time of* the enactment of amended (s) and his amended petition thereunder. He now contends that this jurisdiction vested (retroactively) as of October, 1934, when his original petition was filed. This involves an application of

amended subsection (n) of Section 75, which was not in being prior to August 28, 1935.

There is no conflict between this Court's decision in *Wright* v. *Vinton Branch, etc., Supra,* and the decisions of the Court of Appeals (7th Cir.) in the instant case and in *Lafayette, etc.* v. *Lowmon,* 79 F. (2d) 887, where wholly different facts and rights were involved. In the instant case there are at least five substantial and controlling rights and questions which were not and could not be decided by this Court in the Vinton Branch case and the Court of Appeals (in the instant case) properly so held.

V.

Paragraph (2) of amended sub-section (s) cannot be given effect except in conjunction with Paragraph (3) and if the latter may not lawfully be applied herein, the former must likewise fail. The application of either or both to the instant case would result in violations of the United States Constitution and the Court of Appeals properly so held.

(a) Substantial vested property rights in specific property, viz., both tracts of land involved herein, of the purchaser at the previously had foreclosure sales would be taken from it without compensation and given to the bankrupt. Even the broad powers of bankruptcy would not warrant such violation of the Fifth Amendment.

(b) Application herein of amended sub-section (s) under the construction thereof by this Court, would require the nullification by the Bankruptcy Court of final decrees, (and sales duly had thereunder) of the Circuit Court of Jay County, Indiana, which have been upheld by the Supreme Court of that State.

Those decrees and sales involved property and property rights of which the State had exclusive jurisdiction and

any such action by the Bankruptcy Court would constitute a direct invasion of the State's rights under the Tenth Amendment and the "Full Faith and Credit" clause of the Constitution, (Art. 4, Sec. 1.)

(c) By the decrees and sales in the State Court, the relation of debtor and creditor between the former mortgagor and mortgagee was terminated and thereafter, as to this property and the former debt between the parties, the Congressional powers with reference to bankruptcy could have no application and the Bankruptcy Court no jurisdiction.

VI.

Appellant's criticisms of authorities cited in the opinion of the Circuit Court of Appeals in the instant case are without merit. Said citations demonstrate entire consistency as between that opinion and the decision of this Court in the Vinton Branch case.

ARGUMENT.

I.

It approaches a presumption to cite authorities to this Honorable Court in support of the fundamental proposition that all vested property rights, titles to land and rules of transfer thereof must be determined by the law and settled adjudications of the State wherein said rights or land arise or are situated. This Court has recognized this principle consistently in its learned decisions and has held that the Federal Courts are bound thereby, even in bankruptcy. It is true that in certain instances of general law and even where the Congressional policy demands a broader construction of a statute than has been accorded by the Courts of the State, the Federal Courts are not bound to the same literal degree as in other instances, but never, even under its broad powers in bankruptcy, has this Court announced anything in conflict with this fundamental principle.

White v. *Burnley,* 20 How. 235, 15 L. Ed. 886 (890).

Brine v. *Hartford Fire Ins. Co.,* 96 U. S. 627, 24 L. Ed. 858 (861).

Ridings v. *Johnson,* 128 U. S. 212, 32 L. Ed. 401 (405).

Clarke v. *Clarke,* 178 U. S. 186, 44 L. Ed. 1028.

Security Mortgage Co. v. *Powers,* 278 U. S. 149 (153-4), 73 L. Ed. 236 (240).

Bailey v. *Baker Ice Machine Co.,* 239 U. S. 268, 60 L. Ed. 275.

Olmsted v. *Olmsted,* 216 U. S. 386 (393-4), 54 L. Ed. 530 (533).

Board of Trade of City of Chicago v. *Johnson,* 264 U. S. 1, 68 L. Ed. 533.

The underlying basis for the above principle is the Fifth Amendment to the Constitution. As stated by this Court in *Louisville, etc. Bank* v. *Radford,* 295 U. S. 555, 79 L. Ed. 1593 (1604), "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."

(a) As a manifest correlary to the above general principle this Honorable Court has also said that when the adjudication of the highest Court of a State with respect to real estate situated therein is not followed by other courts, it is equivalent to a denial of the correctness of the elementary proposition above stated.

Clarke v. *Clarke,* 178 U. S. 186, 44 L. Ed. 1028.

(b) In Section 70 of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 110) the property to which the trustee in bankruptcy acquires title is specified under sub-section (a). Subdivision (5) provides, as a test, "property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him." It is now well settled that the law of the State must determine what property and what titles pass to the trustee under this "catch-all" provision of the Bankruptcy Act. That is to say, the title and property rights of the bankrupt, from whom the trustee acquires his title and rights, are fixed by the State law, and the Federal Courts are bound thereby.

It is the exclusive province of the State and its courts to determine what property the bankrupt could have transferred or which, under judicial process against him, might have been levied upon and sold.

Spindle v. *Shreve,* 111 U. S. 542, 28 L. Ed. 512 (514).

Thompson v. *Fairbanks,* 196 U. S. 516, 49 L. Ed. 577.

Zartman v. *First National Bank,* 216 U. S. 134, 54 L. Ed. 418.

Bailey v. *Baker Ice Machine Co.,* 239 U. S. 268, 60 L. Ed. 275.

In re: Landis (*Farmers Bank, Etc.* v. *Beckenbach*), 41 F. (2d) 700 (702) (C. C. A. 7th) Cert. den. 282 U. S. 872, 75 L. Ed. 770.

In re: Waite-Robbins Motor Co., 192 Fed. 47 (49).

In re: Berry, 247 Fed. 700 (705).

In re: Ford-Rennie Leather Co., 2 F. (2d) 750 (754).

Gilbert's Collier on Bankruptcy, 4th Ed., Page 1184.

(c) Appellant conveyed title to the land in question to third parties in October, 1931 by warranty deeds which were duly recorded. No reconveyance was made to him until April 13, 1935, which was long after he had filed his Petition in Bankruptcy.

Under the authorities above cited it will be noted that in bankruptcy the property of the bankrupt is submitted to the jurisdiction of the Court as of the time the Petition in Bankruptcy is filed. In numerous instances, efforts have been made by creditors of a bankrupt, or by the trustee in their behalf, to obtain the benefit of property acquired by the bankrupt subsequently to the date his Petition in Bankruptcy was filed. However, this Court and all other Federal Courts, have consistently held to the principle next above stated and have held that property acquired by the bankrupt subsequently to the filing of his petition is not thereby submitted to the jurisdiction of the Bankruptcy Court and that it belongs to the bankrupt free of all debts scheduled by him and from which he is discharged by virtue of said bankruptcy proceedings.

Thompson v. *Fairbanks,* 196 U. S. 516, 49 L. Ed. 577.

Zartman v. *First National Bank,* 216 U. S. 134, 54 L. Ed. 418.
Bailey v. *Baker Ice Machine Co.,* 239 U. S. 268, 60 L. Ed. 275.
Everett v. *Johnson,* 228 U. S. 474, 57 L. Ed. 927.
Matter of Swift, 259 Fed. 612.
Matter of Seal, 261 Fed. 112.

Applying the foregoing authorities it is obvious that when the right of redemption to the 80.31 acre tract and the title to the entire 200 acre tract (subject to the then pending foreclosure proceedings) were conveyed to Appellant on April 13, 1935, none of the property or property rights *then* acquired by him was thereby submitted to the jurisdiction of the Bankruptcy Court.

It seems self-evident that such property and property rights were not automatically submitted to that Court by the mere enactment of the new Frazier-Lemke Amendment or by the mere filing (without additional schedules or an amendment of the old) of Appellant's amended petition for relief under the new legislation. As a matter of fact, this was ultimately recognized by Appellant when, on *December 23, 1936,* he made formal application to the District Court for leave to amend his original and only schedules which had been filed with his petition in October, 1934. By this application he then sought to submit to the Bankruptcy Court the property here involved. His application at that time was denied and properly so, for at that time Appellee owned absolute title thereto. The denial of such application was the sole basis of the second appeal (No. 716 herein).

(d) The fact that a bankrupt includes in his schedule lands formerly owned and deeded by him to his children cannot affect the rights of his grantees and, in the absence of fraud, the deed cannot be questioned by the trustee in

bankruptcy who takes only such rights as the bankrupt had. Appellant's original schedules were therefore, ineffectual and void as to the property here involved.

Adams v. *Collier,* 122 U. S. 382, 30 L. Ed. 1207.

(e) In the instant case, as will be demonstrated under following Point II, the Supreme Court of Indiana, at the behest of Appellant and the parties to whom he had conveyed the real estate in question, has passed upon the question of what title to or right in this particular real estate was owned by Appellant at the time his original petition in Bankruptcy was filed. For the convenience of this Court, copies of the opinions of the Indiana Supreme Court are attached to this brief as Appendices II and III.

Wright, et al. v. *Union Central Life Ins. Co.* (Ind. Sup. Ct.), 7 N. E. (2d) 206.

Wright, et al. v. *Union Central Life Ins. Co.* (Ind. Sup. Ct.), 10 N. E. (2d) 726.

The same property, the identical parties and the same question of the rights of the latter as to the two tracts of land involved herein, were the subject of these decisions of the Indiana Court and said decisions were had and accepted as final by Appellant during the course of the instant litigation in the Federal Courts. On pages 35, 38 and 40 of the transcript of record herein appear verified pleadings and an assignment of errors filed herein by Appellant in which he refers to the State Court proceedings, including his appeals to the Indiana Supreme Court. Therein he urged upon the District Court that the matter of right of possession of the real estate and other questions affecting same were then under consideration of the Indiana Supreme Court which tribunal, he *then* insisted, had exclusive jurisdiction and control thereof.

The position thus taken by Appellant in the District Court assumes greater significance when considered in the

light of the wording of sub-section (o) (paragraph 2) of Section 75 (U. S. C. A. Tit. 11, Sec. 203) and Appellant's present contention (Point (1) (c) of his brief). Among the proceedings prohibited by paragraph (2) of sub-section (o) after the filing of a petition under Section 75, are proceedings for foreclosure and "for recovery of possession of land."

Both actions by Appellant in the Indiana court following foreclosure were solely for the possession of land. One was for a writ of assistance as to the 200-acre tract and the other was ejectment as to the 80.31-acre tract. Both were resolved against Appellant and he appealed both to the Indiana Supreme Court. As stated, the opinions of the latter are attached to this brief as Appendices I and II. Appellant not only did not question the then jurisdiction of the Indiana court, but, as above stated, definitely urged upon the District Court the exclusive control and jurisdiction of the State tribunal.

We respectfully urge that, combining the principles and the authorities under this point and those of point II, the conclusion is inescapable that when Appellant filed his original petition under Section 75 in October, 1934, he did not have title to either the 80.31-acre tract or the 200-acre tract, could not have transferred the same and that neither of them was subject to levy and sale under judicial process against him. Consequently, as of the date his petition was filed, no title to or property right in said land could have passed to the jurisdiction of the Bankruptcy Court.

(f) In his Reply Brief (page 4) on the application for certiorari herein, Appellant made the point that his lack of title at the time his Petition in Bankruptcy was filed was cured by the alleged fact that Appellee did not raise the question earlier in the proceeding. He makes incidental reference to the point on page 3 of his Brief herein.

While the several answers to this position seem obvious, we will state them briefly:

(1) Ownership of the land, as an essential to jurisdiction, could not be waived by Appellee.

(2) As against the record title owner, or for any purpose, Appellee was without right or authority to confer upon Appellant title to property which admittedly and of record belonged to someone else.

(3) Appellee has never by action or inference, admitted that ownership of these tracts was in Appellant from the time he conveyed them in 1931 to the time of the reconveyances in 1935. Its position has been to the contrary. In both foreclosure suits (instituted after the conveyances by Appellant) the grantees of the latter were made parties defendant as owners and the actions for possession were aimed directly at the grantees, the latter being Appellants in the appeals to the Indiana Supreme Court. We submit that this is entirely inconsistent with the supposed premise that Appellee had recognized Appellant as owner or had conceded such ownership by waiver.

II.

The pertinent land titles and property rights involved herein were determined and became vested by and pursuant to the laws of the State of Indiana. They were, chronologically arranged, as follows:

(a) At the time (October 29, 1934) Appellant filed his original petition for relief under Section 75 he had theretofore, on October 14, 1931, conveyed one tract to his son, and other tracts to his wife, daughter and son-in-law, respectively. (R. 22 *et seq.*) In his answer to Appellee's motion to strike the property from his schedules, he did not question the validity or efficacy of these conveyances. (R. 34-35.) In his motion for leave to amend his schedules by including this property, in December of 1936, he first raised the question.

These conveyances were made in accordance with the

laws of Indiana governing the transfer of land titles and their validity and effect were passed upon by the Supreme Court of Indiana in the first two cases cited below.

Wright, et al., v. *Union Central Life Ins. Co.* (Ind. Sup. Ct.), 7 N. E. (2d) 206.

Wright, et al., v. *Union Central Life Ins. Co.* (Ind. Sup. Ct.), 10 N. E. (2d) 726.

Kitts v. *Willson, et al.*, 140 Ind. 604 (612), 39 N. E. 313.

VanHorn v. *Lindsay* (Ind. App.), 8 N. E. (2d) 409 (411).

Even though the conveyances had been made with the intent to defraud creditors (which is not asserted or intimated in this case) they would be good as between the parties thereto, and are only *voidable* at the instance of an injured party. However, until and unless the injured party takes some step to void the conveyances, the same stand as valid.

Beavans v. *Grof* (Ind. Sup. Ct.), 5 N. E. (2d) 514.

Wild v. *Noblesville, etc.*, 153 Ind. 5, 53 N. E. 944.

VanHorn v. *Lindsay, supra.*

(b) The decrees of foreclosure, respectively, on June 9, 1934 and May 27, 1935, in the Circuit Court of Jay County, Indiana, which were had in accordance with the Statutes of Indiana, determined the rights of the parties to said real estate, and ordered sales thereof pursuant to the Indiana Statute. By this action of the Court the Appellee's rights under the notes and mortgages were merged into the decree and thereafter those rights could not be measured by the contract of the parties, but were fixed and vested by valid State Court decrees pursuant to the laws of Indiana.

Sec. 1174, Burns Annotated Indiana Statutes, 1926.

Wright, et al. v. *Union Central Life Ins. Co.* (Ind. Sup. Ct.), 7 N. E. (2d) 726.

Wright, et al. v. Union Central Life Ins. Co. (Ind. Sup. Ct.), 10 N. E. (2d) 206.

In accordance with the Rules of this Court, we have attached hereto, as Appendix I, a copy of the pertinent sections of the Indiana Statutes referred to in this brief.

(c) Pursuant to said final decrees, and as provided by the Statutes of Indiana, the 80.31-acre tract was sold by the Sheriff on July 12, 1934 and the 200-acre tract was sold by him on July 20, 1935. The usual Certificates of Sale were executed and delivered by the Sheriff to Appellee, as purchaser, and thereupon and thereby he acquired the absolute and unqualified right to full title, with all the incidents and right of enjoyment thereof, at the expiration of one year from the dates of said sales, respectively, its right thereto being *subject only* to the right of redemption as provided by Statute. No subsequent sale or order of Court was necessary to complete his title nor could his right thereto be defeated by any subsequent purchaser or creditor by the use of judicial process or otherwise.

Sec. 821, Burns Annotated Indiana Statutes, 1926.

(d) There was no redemption from said sales within the period fixed by Statute and at the expiration thereof, the Appellee, as purchaser, received deeds conveying absolute title as follows: August 2, 1935 to the 80.31-acre tract and July 20, 1936 to the 200-acre tract. When amended sub-section (s) first came into being and when Appellant filed his Amended Petition thereunder in October, 1935, Appellee was the owner of absolute title to the 80.31-acre tract as of date of sale and the holder of a Certificate of Sale to the 200-acre tract, entitling him to absolute title on July 20, 1936, (as of date of sale) *except only* in the event of redemption before that date.

Sec. 832, Burns Annotated Indiana Statutes, 1926.

Sec. 2-3909, Burns Annotated Indiana Statutes, 1926.

Recker v. *Tell City Bank*, 142 Ind. 99, 41 N. E. 323.

Duesterberg v. *Swartzel*, 115 Ind. 180 (185), 17 N. E. 155.

(e) To permit the Bankruptcy Court, or to construe amended sub-section (s) as intending or purporting to authorize that Court to (1) nullify the final decree entered, the sale had and the final deed delivered to Appellant covering the 80.31-acre tract, or (2) nullify the final decree entered, the sale had and the rights acquired by Appellant as purchaser of the 200-acre tract thereunder, would be a direct invasion of the powers reserved to the State by the Constitution, and a violation of Appellant's property rights theretofore determined by the Courts of the State of Indiana in accordance with the law of that State. We respectfully submit that the Circuit Court of Appeals had no alternative but to conclude that the new legislation, as applied to such property and property rights, was invalid.

We further respectfully urge that in a review of the Circuit Court's conclusion, this Honorable Court should hold either,

(1) That sub-section (n) of Section 75, as applied to property sold in the State Courts and with respect to which the period of redemption had begun to run, is invalid as obnoxious to the 5th and 10th Amendments, and as to such property and property rights cannot be utilized in conjunction with amended sub-section (s) for the purpose of extending relief under the latter; and

(2) That amended sub-section (s), as applied (particularly Paragraph (5)) to property or property rights fixed by local law, and which vested thereunder prior to the enactment of said amended sub-section (s), whether taken in

conjunction with said sub-section (n) or otherwise, is likewise void as opposed to said Amendments,

or

(3) That the evident intention of Congress to so apply this legislation cannot constitutionally be given effect and that therefore, following the doctrine quoted by this Court from *Crowell* v. *Benson,* 285 U. S. 22 (62), 76 L. Ed. 598 (619) this Court will avoid such application.

III.

Under his Points (3) (c) on page 11 of his brief, 3(e) on page 12 and (3) (f) on page 12 thereof, Appellant urges that by the filing of his original petition under Section 75, in October, 1934 and the order of reference thereof, the Bankruptcy Court acquired exclusive jurisdiction of the land involved herein, that Paragraph (5) of sub-section (s), as amended August 28, 1935, effected a continuation of said jurisdiction and that, in the interim the mortgagee could acquire no adverse rights in this land under the State laws and the decrees of its Courts.

The above is the major premise of Appellant's brief and his claim for relief under the Amended sub-section (s). It is unsound and cannot be sustained, for the following reasons, some of which have been necessarily discussed under the preceding Points of this brief:

(a) At the time his original petition under Section 75 was filed, Appellant owned neither the 80.31-acre tract nor the 200-acre tract and the Bankruptcy Court could not and did not acquire jurisdiction of either under that petition. Accordingly, Paragraph (n) of Section 75 could not and did not operate to invest the Bankruptcy Court with exclusive jurisdiction of this land, as of October, 1934. Further discussion is unnecessary here as the ground has already been covered.

(b) Appellant could only qualify for relief under the terms of original sub-section (s) by abandoning his application for relief under the preceding sub-sections of Section 75 as unavailable to him, and this he claims to have done. When the original (s) was declared unconstitutional, it was in effect as though never passed. (*Chicago, etc. Ry. Co.* v. *Hackett*, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. 966; *Norton* v. *Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1114, 30 L. Ed. 178.) If his proceeding was pending at all on August 28, 1935, it could only have been in general bankruptcy wherein the exclusive jurisdiction feature is not involved.

(c) As the Bankruptcy Court had no jurisdiction of this land by reason of Appellant's original petition under Section 75, and as the property or rights therein subsequently acquired by him were not submitted for relief herein until December, 1936, after Appellee had acquired absolute title to both tracts, the Indiana Courts, in the meanwhile had the undeniable right to deal with the property and to determine the rights of the parties with respect thereto.

In connection with the above (c) we respectfully call to this Honorable Court's attention, the following:

The first time, after the land involved herein had been reconveyed to him, that Appellant made any attempt to vest the Bankruptcy Court with jurisdiction thereof or to submit same for relief under Section 75 or either of its subsections, was on December 23, *1936*. On that date, he sought leave to amend his original (and only) schedules, which had been filed in October, 1934 (before he had reacquired title) so as to include this land.

By that step, Appellant

First: Necessarily acknowledged that the land had never before been within or subject to the jurisdiction of the Bankruptcy Court. Neither the amended schedules nor

his motion for leave to file same even pretended to assert that their presentation was a *re-submission* of this land, or that Appellant contended that they ever before had been within the Court's jurisdiction; and

Second: Waived all questions he had theretofore sought to save by appeal under the Court's order sustaining Appellee's petition to strike the land from the original schedules in which they had wrongfully been included. The questions thus waived are those presented in Appellant's first appeal, #715 herein.

IV.

NOTE: For a better understanding of the argument herein as opposed to Appellant's brief, we call attention to the following:

In the Court of Appeals, Appellant's position was that the enactment of sub-section (s), as amended August 28, 1935, operated to give the Bankruptcy Court jurisdiction of the land *as of the date of said enactment*, viz., August 28, 1935. In this he virtually conceded that the period for the redemption of the 80.31-acre tract had expired and a final deed therefor had been properly issued and that the sale of the 200-acre tract had properly been had and the period of redemption had begun before the amendment of August 28, 1935. His contention in the Court of Appeals, therefore, was that amended sub-section (s) could and did (1) extend the period of redemption of the 200-acre tract and (2) void the final deed to the 80.31-acre tract, issued prior to the new amendment. (See the opinion of the Circuit Court of Appeals. (R. 70.)) This also appears to have been his position in the District Court as nothing in his Assignment of Errors (R. 11, 12 and 13) indicates the contrary.

His brief in this Court, however, takes the position that, regardless of his non-ownership of the land when his

original petition was filed, the enactment of August 28, 1935, carried the alleged jurisdiction of the Bankruptcy Court back to October, 1934. The case was not decided by the Court of Appeals on any such basis and Appellant is not entitled to ask that the opinion of that Court be reviewed on such premise.

The reason for the shift is obvious. Thereby, Appellant endeavors to bring the 200-acre tract within the facts and purview of the Vinton Branch decision by establishing, if he can, that the Bankruptcy Court acquired jurisdiction before decree or sale. Also, he desires to avoid the difficulty of the final deed which had issued to the 80.31-acre tract before the enactment of amended sub-section (s).

* * * * * *

There is no conflict between the decision of this Court in *Wright* v. *Vinton Branch, etc.,* 300 U. S. 440, 81 L. Ed. 736, and the decisions of the Court of Appeals for the Seventh Circuit in the instant case and in *Lafayette Life Insurance Co.* v. *Lowmon,* 79 F. (2d) 887. This assertion is respectfully and sincerely advanced on the premise, supported by a detailed analysis of these cases, that the two Courts were, respectively, dealing with entirely different facts and rights.

Even though it could be held, which we cannot conceive, that the mere enactment of sub-section (s), as amended August 28, 1935, or the filing by Appellant of his amended petition for relief thereunder on October 11, 1935, operated to bring into the jurisdiction of the Bankruptcy Court, property or property rights acquired by him after the filing of his original petition, the only property or property right he then had was a right of redemption of the 200-acre tract. The period of redemption of the 80.31-acre tract had expired and Appellee had received an absolute deed thereto on August 2, 1935.

Upon this hypothesis, the question squarely arises as to the applicability of this Court's decision in the Vinton Branch case to the instant case. Also, in such situation does or does not Congress have the power to authorize a nullification of a State Court decree, the sale had thereunder, and either an extension (virtually a destruction) of the period of redemption for three years or an order of resale in lieu thereof?

It is our earnest contention that the Vinton Branch decision, involving wholly different facts and rights, cannot possibly be construed as adverse to the opinion of the Circuit Court of Appeals that any attempt by the Congress to assert such power would be a direct deprivation of Appellee's rights under the Constitution.

As to the 80.31-acre tract, we believe that no serious question can arise, either under the provisions of Section 75 or with regard to amended sub-section (s). At the time Appellant's original petition was filed, he was not and for about three years had not been the owner of this tract. Under foreclosure decree the tract was duly sold to Appellee on July 12, 1934, so that when, on April 13, 1935, the then owner conveyed to Appellant, he conveyed only what he owned, viz., the right of redemption. On August 2, 1935, the period of redemption having expired, Appellee acquired absolute title to this tract by final decree, wherefore, this property could not and never did come within the provisions of Section 75 or the purview of amended sub-section (s), which was not in existence at that time. If not within the Act, it was not, of course within the purview of this Court's decision with respect thereto. Hence, as to this property, there could be no conflict between the decision of the Circuit Court of Appeals in the instant case and that of this Honorable Court in the Vinton Branch case.

Let us have in mind also, that sub-section (n) of Section

75 was not involved in the Vinton Branch case whereas, in the case at bar, Appellant urges a combination of (n) and the amended (s) in an effort to establish jurisdiction in the Bankruptcy Court.

When sub-section (n) of Section 75 was amended on August 28, 1935, a part of the additions effected by said amendment read as follows:

> "In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section."

Accordingly, prior to the 1935 Amendment, Congress had not even attempted to apply the provisions of Section 75 to all the situations mentioned in the Amendment nor, affirmatively, to provide for an extension of the period of redemption.

> Sec. 75 of the Bankruptcy Act, as amended March 3, 1933.
> 47 Stat. 1470 (1473), (C. C. A., Title 11, Sec. 203).

Accordingly, as there had been a sale and the period for redemption therefrom had begun to run on the 80.31 acre tract at the time Appellant's original petition was filed in October, 1934, the amended sub-section (n) could not apply. Consequently, even under the new theory adopted in Appellant's brief this tract could not be affected by the present proceeding.

As to the 200-acre tract. This property not being owned by Appellant when his original petition was filed, was not then brought within the jurisdiction of the Bankruptcy Court. If such jurisdiction attached at the time and by

reason of the enactment of amended sub-section (s), or by reason of the mere filing of his amended petition for relief thereunder, as contended by Appellant in the District and Circuit Courts, it must be conceded that prior to both of said dates a valid sale had been duly had in the State Court and Appellant had only a right of redemption.

This was the state of the facts and property rights upon which the Court of Appeals passed in this case and the Lowmon case was quite similar. Its decisions in both are here attacked as being contrary to this Court's decision in the Vinton Branch case. In the latter (a) no decree of a State Court had been had nor were Court proceedings even pending; (b) there had been no sale of the property and no rights had attached on behalf of any purchaser at a sale; (c) the rights affected existed only by virtue of the mortgage-contract and had not been fixed or vested by a Court decree into which the mortgage had merged, as in the instant case; (d) no period of redemption had begun to run at the expiration of which, as in this case, the purchaser would have an absolute right to a deed, subject to defeat only by redemption; (e) the debtor-creditor relation still remained, a proper subject of bankruptcy jurisdiction; and (f) this Court could apply sub-section (s) so as to uphold the jurisdiction of the Bankruptcy Court without being obliged to hold that Congress and the Bankruptcy Court had the power and authority to nullify a previous valid decree of a State Court, had in accordance with the law, a valid sale thereunder, and substantial property rights acquired by a purchaser under said decree and sale.

In the instant case the exact reverse of each of these elements is true and we respectfully urge that by no possible inference to be drawn from this Court's opinion, could the latter be extended to cover such a divergent state of basic facts. The same is true as to the record in the Lowmon case

and we submit that the Court of Appeals, in its respectful adherence to the principles announced by this Court, could find no warrant for a belief that the Vinton Branch decision overruled the Lowmon opinion or could have any application to the record in the instant case. Be it remembered that the decision of this Court in the Vinton Branch case, *as applied to the record there presented,* is not in question in this appeal. Its soundness was not questioned in the Court of Appeals. Its application to a wholly different situation without violation of the Constitution, however, was deemed impossible.

V.

Despite this Court's definite conclusion in the Vinton Branch case that amended sub-section (s) does not afford an absolute stay, Appellant urges throughout his brief that Paragraph (2) expressly stayed all State Court proceedings (in effect extended the period of redemption) for three years. On his theory that jurisdiction attached in October, 1934, Appellant, of course, seeks to apply this stay with respect to the 80.31-acre tract. However, while he could not have applied it to this tract on his theory in the Courts below, nevertheless it would have applied to the 200-acre tract, *upon his lower court theory.* For this reason we answer his contention.

In the Vinton Branch opinion, this Honorable Court held that it had no occasion to decide whether an absolute stay of three years would have been justified under the bankruptcy power for the reason that the stay provided was *not* absolute. Apparently impressed with serious doubt as to the constitutionality of an absolute stay, if so construed, the Court followed the recognized doctrine of *Crowell* v. *Benson,* 285 U. S. 22, that in such situation the Court will seek a construction whereby the constitutional question may be avoided.

This doubt was evidenced and the power of Congress to grant a stay, conditional and discretionary with the Courts, was upheld in a case where no State Court decree, or even proceedings, had been had and no sale effected whereby definite and valuable rights had accrued and no period of redemption provided by a State law had come into being. In effect, the Court held that, *on its face*, the provision could not be said to be invalid and that, as against the principal ground asserted in support of the contention of unconstitutionality, this Court could not say that the Acts might not properly be applied to the case then on review. The conviction is inescapable that this Court found it possible to hold the stay or redemption extension valid only because of the power given the Court by the Act to control and terminate the stay by sale and the particular case admitted of such application of the Act.

However, such application of the Act is not possible in the instant case. Paragraph (2) cannot be divorced from paragraph (3) or any other of the concurrent paragraphs. This Court has said that the stay or extension of the redemption period is not absolute under (2) but is merely conditional and must be construed in conjunction with the power granted the Court under (3) to order a sale at any time within the three years. The Court of Appeals believed that an application of such construction was not constitutionally possible in a case where a sale had been had and property rights had vested thereunder by virtue of a final decree, pursuant to the laws of the State. Under the holding of this Court such conclusion appears absolutely sound. If the stay is valid, the Bankruptcy Court must have the right of re-sale and other powers of control under paragraphs (2) and (3). If and as applied to the instant case, the powers granted by paragraph (3) are invalid, the stay provided by paragraph (2) must also fall.

In the face of the previously accomplished sale and the acquisition of positive property rights thereunder it is inconceivable that Congress may give the Bankruptcy Court power to nullify them.

As stated by this Court in the Radford case, (p. 601), "The province of the Court is limited to deciding whether the Frazier-Lemke Act *as applied*", has violated the Constitution. The Court then said: "As we conclude that the Act *as applied* has done so, we must hold it void". (Italics ours.)

The violation there was specified as taking from the mortgagee without compensation and giving to the mortgagor, rights in specific property which were of substantial value.

In the Vinton Branch opinion it was said the creditor *conceded* that three of the five rights violated by the original Act (and so decreed in the Radford case) were protected in the new Act and only the two others were urged as objectionable under the new Act. One was the right to determine when the sale should be had and the other related to the right to control the property during default. The Court found, however, that on the face of the Act and as applied to the given facts, both could be said to have been preserved also.

In the instant case, no such application is possible. We have no quarrel with Appellant's citations of Indiana statutes and authorities as to the status of the right of redemption and the rights of the owner thereof. But *it was not the right of redemption which Appellant attempted to submit to the jurisdiction of the Bankruptcy Court.* He sought relief based on *his alleged ownership of the land*—a false premise, as decided by the Indiana Supreme Court in one of the cases hereinbefore mentioned,—*Wright, et al.* v. *Union Central Life Ins. Co.*, 7 N. E. (2d) 206. (Appendix II.)

(a) The Circuit Court of Appeals would not ignore the further proposition (which Appellant does not refute) that once a sale is had, the purchaser's relation to the property is not that of a mortgagee or a creditor secured thereby. Indeed, the purchaser may be an utter stranger to the mortgage and the debt. But whether he be the former mortgagee or an utter stranger, he has acquired certain definite rights of property by the *decree and sale* and to deprive him of same without compensation and for the benefit of the owner of the right of redemption brings the case directly under the Radford decision and others there cited as violative of the Fifth Amendment.

Among the rights of property referred to are the following:

(1) The absolute and unqualified right to full title, with all its incidents, at the expiration of one year, subject only to right of redemption within that period by the payment of the full amount of the sale price, plus interest at 8 per cent.

(2) The right to such full title and possession without interposition of a further judicial sale and without further delays, expense or the burdens of competitive bidding.

(3) The right to the property, if there be no redemption as it stands at the end of *one year* and not as it may be at the end of two or three years if a resale were then had under paragraph (3);

(4) The benefit of a fixed and definite recovery in the event of redemption instead of the prospect of an uncertain amount in the event of an appraisal and resale in the Bankruptcy Court.

Destruction of said rights is obnoxious to the Fifth Amendment in that it involves the taking of property rights from the purchaser without compensation and re-vesting the debtor with unrestricted title, unburdened of such rights. It serves not only to extend the period of redemption but to *wipe out the need of redemption.* It is not the

impairment of a lien alone, but the actual enlargement of debtor's estate at the expense of that of the purchaser which, in turn, is thereby diminished. If ever a deprivation of property without "due process" was involved, this is a flagrant instance.

As said in *Citizens Savings and Loan Association* v. *Topeka,* 20 Wall. 655 (662, 664), 22 L. Ed. 455 (461). "No court, for instance, would hesitate to declare void a Statute which enacted * * * that the homestead now owned by A should no longer be his, but should henceforth be the property of B."

The above case was cited by this Court in the Radford opinion, as was *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139 (161), 57 L. Ed. 1427 (1437), wherein this Honorable Court stated, "Without the guaranty of 'due process' the right of private property cannot be said to exist".

Applying to the 80-31-acre tract, Appellant's theory that the jurisdiction of the Bankruptcy Court attached as of the date of the Enactment of Amended Sub-Section (s), the violations of the Constitutional Amendments (particularly the Fifth) are even more marked and such application conflicts with the express provisions of the Act itself.

As heretofore noted, at that time the period of redemption as to this tract had expired and the deed, conveying absolute title to Appellee, had issued. Even the terms of sub-section (n) would preclude jurisdiction in the Bankruptcy Court. If (which we cannot imagine) it were held otherwise, the immediate result would be the nullification of Appellee's deed, the actual taking from him of absolute title and re-vesting the same in Appellant. This would constitute an unqualified violation of the latter's rights under the Fifth Amendment.

On the other hand, if Appellant's far-fetched theory that the Bankruptcy Court acquired jurisdiction in October,

1934, of property which Appellant did not then own, it will be recalled that this 80.31-acre tract had theretofore been sold under State Court decree and was, in October, 1934, in the period of redemption. Under Appellant's new theory, therefore, the above argument as to property sold and in the period of redemption at the time bankruptcy is to have taken jurisdiction, would apply and need not be repeated here.

(b) An application of sub-section (s) to the instant case also involves violations of the Tenth Amendment and Article 4, Section 1 of the Constitution.

The right of the State to deal with titles to lands within its boundaries, and to make laws for the descent, alienation and descent of land, has never been surrendered to Congress, under its bankruptcy powers or otherwise. (*Louisville, etc. Bank* v. *Radford, supra.*) If the Act be applied to the situation presented in the instant case, an immediate invasion will result as to the reserved powers of the State to control this subject by legislation and to fix land titles and rights through the decrees of its courts and judicial sales thereunder. If paragraph (3) be applied, the power of the Bankruptcy Court to re-sell land thereunder would, of necessity, immediately involve the right of that Court to nullify the previous sale and the State Court decree by which it was ordered.

As a matter of fact, *both* of Appellant's theories are further objectionable as involving an invasion of the "Full Faith and Credit" clause of the Constitution. (Art. 4, Sec. 1.) Both require that the Bankruptcy Court nullify previous final decrees of the Indiana Court. This Court has flatly held that under the Constitution, Federal Courts are just as much bound to honor the judgments of a State Court as are Courts of any State foreign thereto.

Cooper v. *Newell,* 173 U. S. 555 (567), 43 L. Ed. 808.

None of the above objections under the Fifth or Tenth Amendments or the "Full Faith and Credit" clause was before this Court in the Vinton Branch case and none was there decided. Hence, we against respectfully urge that the Court of Appeals could not and did not apply that decision as controlling in the instant case.

(c) The Court's attention is respectfully directed to another fundamental question which would bar jurisdiction of the Bankruptcy Court over the property involved herein.

In the present case there were decrees of foreclosure which determined the amount due from the mortgagor to the mortgagee and ordered sales of the mortgaged property to satisfy the debt. The sales were had, the property was bid in and to the extent of the purchase price the mortgagor was released (*discharged*) from his debt. By the same token, the mortgagee lost his character *as such* and as a *creditor* and thereupon became the holder of the certificate of the sale which satisfied the debt. From that moment the relation of mortgagor and mortgagee and debtor and creditor vanished.

Bankruptcy powers necessarily and inherently deal with the debtor-creditor relation. Originally, it was said that the object of bankruptcy legislation was to effect an equal distribution of the bankrupt's property among his creditors. This definition has been broadened until, as stated by this Court in the Radford case, the matter of *the bankrupt's discharge* is to be regarded as "an object of no less concern than the distribution of his property".

See also, Remington on Bankruptcy (4th Ed.) Vol. 1, Chap. II, Sec. 20 and Chap. III, Sec. 47.

However, where a decree of foreclosure and a sale have already been had, not only is there no longer a debtor-

creditor relation subject to the jurisdiction of bankruptcy but *no debt remains* in connection with the mortgage foreclosed or the property involved therein (except in the event of a deficiency, which element is not involved here). The bankrupt has already been discharged from that debt by means of the foreclosure sale and the *property itself has been conveyed to pay the debt.* It is no longer available for distribution in bankruptcy. Hence, neither the element of distribution nor that of discharge remains subject to the exercise of the bankruptcy powers. Justification of this legislation, as applied to the instant case, cannot be found, even under the broad powers of bankruptcy.

From the terms of sub-section (n) as amended and from the Reports of the Congressional Committees we believe it must be conceded that it was the intention of Congress that this Act be applied to cases wherein sales had been had as well as those involving no prior sales. In various parts of his brief, Appellant complains that the Court of Appeals did not give effect to this intention and he appears to believe that this failure renders that Court's decision erroneous. No citation of authority is necessary to establish that where the intention of Congress is lawful and effect thereto may lawfully be given, it is the Courts' duty so to do. On the other hand, it is equally fundamental that if the intent of legislation or the giving effect thereto will render the same obnoxious to the Constitution, not only are the Courts not bound by such intention but must, if possible, find some other construction and application whereby this objection may be avoided. *Wright* v. *Vinton Branch, etc., supra.*

In conclusion of this point, we will not undertake in detail to refute Appellant's unfounded assertions that by the mere mention of the Lowmon case in the opening paragraph of its Vinton Branch opinion, this Court meant to

indicate that same was overruled by the latter and that if the Court had not intended such result it would have said so. We are content to adopt the Circuit Court's expression (R. 72): "We interpret this paragraph as being merely a basis for granting a certiorari." If, without analyzing the varying records involved in the various cases in the several Circuits, there appeared to be some conflict or confusion in the application of a Federal Statute, it was, of course eminently proper and highly desirable that this Court should grant certiorari. Likewise, it seems quite fair to assume that had this Court intended its application to be followed under any state of facts other than there presented, it would have so indicated. As a matter of fact, not one of the cases mentioned in said opening paragraph was again referred to in the opinion, nor did this Court give the slightest intimation that the opinion was intended to apply to the varying facts, respectively, of said several cases.

VI.

In its opinion in the case at bar, 91 F. (2d) 894 (R. 67-74) the Circuit Court of Appeals (7th Cir.) cited two decisions of this Honorable Court in support of its conclusion that in the Vinton Branch opinion this Court had evinced no inclination to depart from its previous holdings on the basic questions here involved. They were, *Home Building & Loan Assoc.* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, and *Chicago Board of Trade* v. *Johnson,* 264 U. S. 1, 68 L. Ed. 533. The latter has been cited early in this brief. On pages 31 and 30, respectively, Appellant has criticized the citations of and quotations from these decisions in the Court of Appeals opinion.

It is obvious that the citation of the Blaisdell case was intended, primarily, to emphasize two legal truths. *First,*

that without *valid* legislative authority the Courts would have no power to alter a statutory period of redemption; and, *second*, that such authority was valid in that case because it was *State legislation* on a subject over which the State had reserved to itself the power of control. Thus, inferentially, a holding that the Congress had no power adverse thereto.

The Court of Appeals' quotation from the Johnson case is but a reiteration of the many expressions of this Court to the same effect. In the instant case there is no element of Congressional policy requiring a broader construction of the State statutes affecting land titles, conveyances thereof and Court decrees with reference thereto. Hence, the quotation as to the binding effect of State law in that field, may be literally applied herein, without restriction.

In his brief, Appellant seeks to establish that the decisions of the Indiana Supreme Court with respect to the property here involved (See our Appendices II and III) turned on a construction of sub-section (s). Nothing could be farther from the fact, at least insofar as those decisions affect the titles and rights of property. Those elements were decided by the Indiana Court on the basis of the law and settled adjudications of that State and in that respect the decisions are binding on all other Courts.

Appellant cites several District Court decisions wherein, he claims, the filing of petitions under (s) during the period of redemption was approved. As a matter of fact, not all of those citations support his premise and an equal number to the contrary are probably available. However, we are now looking to the highest authority in the land on this question, which it has not yet adjudicated, and possible conflicts between the District Courts are not particularly pertinent here.

Conclusion.

We respectfully submit that the Circuit Court of Appeals did not err in upholding the two orders of the District Court from which the appeals involved herein were taken. Those orders were:

1. Sustaining Appellee's motion to strike this real estate from the schedules filed in October, 1934, when he did not own same; and

2. Denying Appellant's motion, made in December, 1936, asking leave to then amend the schedules he had filed in 1934, so as to include said real estate therein.

It is our sincere contention that the Circuit Court of Appeals very properly held that amended Sub-Section (s) was invalid as applied to the case at bar.

We most respectfully submit that the judgment of the Circuit Court of Appeals for the Seventh Circuit, should be affirmed.

Respectfully submitted,

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Roscoe D. Wheat,
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APPENDIX I.

Burns Annotated Indiana Statutes, 1926.

Quotations of pertinent portions referred to in Brief.

821. CERTIFICATE OF PURCHASE—CONTENTS—DUPLICATE—RECORD—ASSIGNMENT—1. Whenever any real estate or interest therein shall be sold by the sheriff on execution or decretal order, he shall issue to the purchaser (or, if the real estate be sold in parcels to different purchasers, to each purchaser) a certificate of purchase. Such certificate shall show the court in which the judgment or decree was rendered, the parties thereto and date thereof, the dates of the execution and sale, the name of the owner and purchaser, and price paid; and shall contain a particular description of the premises and the estate therein sold, whether in fee, for life, or for years, and shall state the time when the purchaser will be entitled to a conveyance of the property. The sheriff making such sale shall prepare and sign a duplicate of such certificate of purchase, and forthwith deliver it to the clerk of the circuit court of the county in which such real estate is situate. Such clerk shall immediately record the certificate in the "Lis Pendens Record" kept in his office. The certificate shall be assignable by indorsement, and shall entitle the purchaser, his heirs, devisees or assigns, to a conveyance of the estate in said real property bought by such purchaser, at the expiration of one year from the date of his purchase unless the same shall have been previously redeemed as hereinafter provided. Any assignment of such certificate, duly acknowledged as in case of deeds, shall, together with the

acknowledgment, be recorded by the clerk in the "Lis Pendens Record" at the request of the assignee, and on the payment or tender of the fees allowed therefor.

832. MANNER OF REDEMPTION BY OWNER—"LIS PENDENS" ENTRY.—3. The real estate, or interest therein, sold as aforesaid, or any part thereof separately sold, may be redeemed at any time within one year from the date of such sale, by the owner thereof, or by his executor or administrator, under the direction of the court appointing him or the judge thereof in vacation, or by his heirs or devisees, or by any one holding either the legal or equitable title, by paying to the clerk of the court in whose office such certificate of purchase is required to be recorded, for the use of the purchaser, his executors, administrators or assigns, the amount of his purchase-money, and interest at the rate of eight per cent per annum thereon from the date of his purchase; or if the premises shall have been previously redeemed by any person having a lien thereon, as hereinafter provided, then by paying to such clerk, for the use of the last redemptioner, the amount paid by him for the redemption, with interest at the rate of eight per cent per annum thereon and his cost of redemption, * * *.

1174. PERSONAL JUDGMENT—ORDER OF SALE.—714. In rendering judgment of foreclosure, the court shall give personal judgment against any party to the suit liable upon any agreement or agreements for the payment of any sum or sums of money secured by the mortgage, and shall order the mortgaged premises, or so much thereof as may be necessary to satisfy the mortgage and judgment and costs of the action, to be first sold, before levy of execution upon other property of the defendant. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment.

1179. CERTIFIED COPY OF ORDER ISSUED TO SHERIFF—SALE. —717. The copy of the order of sale and judgment shall be issued and certified by the clerk, under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest and costs, as upon execution; and if any part of the judgment, interest and costs remains unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the defendant.

APPENDIX II.

Vol. 7, North Eastern Reporter, 2d Series (Ind.), p. 206:

WRIGHT *et al.* v. UNION CENTRAL LIFE INS. CO.

No. 26782.

SUPREME COURT OF INDIANA.

April 2, 1937.

1. Mortgages 594(3)

After issuance of certificate of sale to mortgagee who purchased mortgaged farm at foreclosure sale, grantee to whom farm was deeded prior to foreclosure had only right to redeem, and hence sole right conveyed by deed to mortgagor after issuance of certificate was right to redeem expiring one year from date of sale.

2. Mortgages 543

Right of mortgagee which purchased mortgaged farm at mortgage foreclosure sale to possession of farm after expiration of redemption period, as against mortgagor who, prior to foreclosure, deeded property subject to mortgage to son who was joined in foreclosure proceeding and who reconveyed right to redeem to mortgagor after expiration of redemption period and after petition in bankruptcy had been filed by mortgagor, held not affected by moratorium provisions of amendment to Bankruptcy Act (Bankr. Act, Sec. 75(s) as amended Aug. 28, 1935, 11 U. S. C. A. Sec. 203(s).

Appeal from Jay Circuit Court; HANSON F. MILLS, *Judge.*

Action by Union Central Life Insurance Company against Walter C. Wright and others. Judgment for plaintiff, and defendants appealed to the Appellate Court, by which the cause was transferred to the Supreme Court under Burns' Ann. St. 1933, Sec. 4-217.

Affirmed.

Samuel E. Cook and Homer E. Bailey, both of Huntington, and Wheeler Ashcraft, of Portland, for appellant.

Roscoe D. Wheat, of Portland, for appellee.

FANSLER, *Judge.*

Prior to 1931, appellant James M. Wright mortgaged the farm, the possession of which is here in question, to appellee. Thereafter in 1931, his wife joining him, he conveyed the property to his son, Walter C. Wright, subject to the mortgage. On June 9, 1934, appellee obtained a judgment foreclosing its mortgage in an action in which James M. Wright and Walter C. Wright were both parties defendant. On July 12, 1934, the property was sold by the sheriff in satisfaction of the judgment. It was purchased by appellee, who received a sheriff's certificate of sale. On October 30, 1934, James M. Wright, filed a petition in bankruptcy, under section 75, subsection (s) of the Bankruptcy Act (Frazier-Lemke Act, 48 Stat. 1289). In his petition in bankruptcy he scheduled the real estate in question, which he did not own. On April 13, 1935, Walter C. Wright and others deeded the real estate to James M. Wright. On May 27, 1935, in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106, the Frazier-Lemke Act was declared unconstitutional. On August 2, 1935, appellee surrendered its certificate of sale and received a deed to the land. On August 28, 1935, Congress enacted a new Bankruptcy Act

(Frazier-Lemke Farm Mortgage Act), 11 U. S. C. A. Sec. 203(s). See *Lafayette Life Ins. Co.* v. *Lowmon* (C. C. A.), 79 F. (2d) 887. On September 13, 1935, appellee brought this action against appellant Walter C. Wright and Virgie M. Wright, his wife, alleging that appellee is the owner of the real estate in question, and entitled to possession thereof; that defendants are holding possession without right, and have unlawfully kept the plaintiff out of possession; and asking damages in the sum of $100. Appellant James M. Wright petitioned to be, and was, admitted as a party defendant. Defendants answered, setting up the petition of James M. Wright in bankruptcy; that he had been declared a bankrupt; that the court had no jurisdiction; and that Walter C. Wright and Virgie M. Wright held possession of the real estate as tenants of James M. Wright. Afterwards Virgie M. Wright filed an answer disclaiming any interest in the real estate. There was a trial, and judgment for the plaintiff for possession and $50 damages.

(1) It will be noted that, at the time of the judgment and sale of the property to appellee, James M. Wright was not the owner of the property; that it was deeded to him by Walter C. Wright after the certificate of sale was issued, and after the filing of his petition in bankruptcy. At that time, the only right, title, or interest that Walter C. Wright had in the property was the right to redeem prior to July 12, 1934. Walter C. Wright, who claimed by his answer to hold possession of the property as tenant of James M. Wright, was a party to the foreclosure proceeding, and knew that all of his right, and all of the right which he conveyed to James M. Wright, in the real estate, was a right to redeem. This right expired by statute one year from the date of the sale.

(2) Appellants do not point to any provision in the

amendment of the Bankruptcy Law which would bring within its terms a right of redemption acquired from another after the filing of the petition in bankruptcy, or which would bring within its terms any property which was not owned by the bankrupt at the time his petition was filed, and no such provision is apparent. The cases in which the constitutionality of the act was considered involve property of a bankrupt mortgagor in which he had some right, title, or interest at the time his petition was filed. The moratorium provision of the Bankruptcy Act does not apply.

Judgment affirmed.

APPENDIX III.

Vol. 10, North Eastern Reporter, 2d Series (Ind.), p. 726:

WRIGHT *et al.* v. UNION CENTRAL LIFE INS. CO.

No. 26799.

SUPREME COURT OF INDIANA.

October 26, 1937.

1. Mortgages 544(3)

In mortgage foreclosure suit, wherein plaintiff filed petition for writ of assistance to obtain possession of mortgaged land after purchasing it at foreclosure sale, defendants were not entitled to change of venue from county; since writ of assistance is a summary proceeding ancillary to foreclosure action, and precludes trial of question as to right of possession.

2. Mortgages 544(3)

A writ of assistance to put purchaser at mortgage foreclosure sale in possession of mortgaged land being a summary proceeding, service of notice thereof on defendants in foreclosure action was sufficient and formal summons unnecessary.

3. Mortgages 544(3)

An equity court has power to hear summarily in vacation a petition for writ of assistance to put purchaser at mortgage foreclosure sale in possession of mortgaged land.

4. Mortgages 544(3)

No question is presented by filing motion for new trial after granting of writ of assistance to put purchaser at

mortgage foreclosure sale in possession of mortgaged land.
5. Mortgages 544(3)

A petition for writ of assistance to put purchaser at mortgage foreclosure sale in possession of mortgaged land was properly filed in circuit court which rendered foreclosure decree after change of venue from county wherein mortgaged land was located.

6. Mortgages 544(3)

In mortgage foreclosure action, defendants were not entitled to interpose, as defense to petition for writ of assistance, filed by purchaser at foreclosure sale, matters which subsequently arose affecting possession of mortgaged land; defendant's right of possession being forfeited when they failed to redeem property.

Appeal from Adams Circuit Court; HUBER M. DE VOSS, *Judge.*

Action by the Union Central Life Insurance Company against James M. Wright and others. Judgment for plaintiff, and from a judgment granting plaintiff a writ of assistance, defendants appeal.

Affirmed.

Samuel E. Cook and Homer E. Bailey, both of Huntington, and Wheeler Ashcraft, of Portland, for appellants.

Roscoe D. Wheat, of Portland, for appellee.

TREMAIN, *Judge.*

On the 1st day of October, 1925, the appellant James M. Wright was the owner of 200 acres of land in Jay county, Ind., and executed a mortgage to the appellee to secure a debt of $9,000. After the execution of the mortgage and before a foreclosure suit was filed, he conveyed the land

to his wife, son, daughter, and son-in-law in parcels. The appellee filed its action in the Jay circuit court to foreclose said mortgage and made all the named parties defendants. The death of the wife was suggested to the court, and the cause was dismissed as to her.

Pending the foreclosure suit, and on the 30th day of October, 1934, James M. Wright filed his petition in bankruptcy and claimed the benefits of the Frazier-Lemke Act (Bankr. Act, Sec. 75(s), as added by Act Cong. June 28, 1934, 48 Stat. 1289, 11 U. S. C. A., Sec. 203(s) note). On May 27, 1935, personal judgment was rendered against the said James M. Wright for the sum of $11,975.11, and for foreclosure of the mortgage as against all of the defendants. This judgment was rendered in the Adams circuit court, a change of venue having been taken by the defendant James M. Wright from the Jay circuit court. An order of sale was issued to the sheriff of Jay county, and on July 20, 1935, the real estate was sold to the appellee for the amount of its judgment and costs. A certificate of sale was issued to it, and on July 20, 1936, the property not having been redeemed, a sheriff's deed was duly executed to the appellee.

The appellants continued to hold possession of said real estate, and upon demand refused to surrender possession. The appellee filed a petition in vacation for a writ of assistance in the original action to foreclose the mortgage, in the Adams circuit court, and caused notice to be served upon appellants. The appellants appeared and filed answers in which they objected to the jurisdiction of the court, and also claimed that they were entitled to hold possession of the real estate for a period of three years, pursuant to the Fraizer-Lemke Act (Bankr. Act, Sec. 75(s), as amended by Act Cong. Aug. 28, 1935, Sec. 6, 11 U. S. C. A., Sec. 203(s). James M. Wright filed a motion and affidavit for

a change of venue from the county, which the court overruled. A hearing was had, in vacation, and the court granted the writ of assistance, and ordered immediate delivery of the possession of the land to the appellee. The appellants filed motion for a new trial, which was overruled, and this appeal was perfected.

The claim of the appellants to the benefits of the moratorium provision of the Frazier-Lemke Bankruptcy Act was decided in this court adverse to their contention in the case of *Wright et al.* v. *Union Central Life Ins.* Co. (Ind. Sup.) 7 N. E. (2d) 206. The question there before the court and the facts are the same as in the case at bar.

(1-3) The appellants admit in their brief that a writ of assistance is a summary proceeding and cite authorities holding that it is ancillary to the main action, but they claim that it is a civil suit, and under the statute are entitled to a change of venue from the county. This court has held that a change of venue does not lie from an application for a receiver which is ancillary to a pending action. This is because the application for the appointment of a receiver does not ask for a judgment determining the rights of the parties, but asks only for an interlocutory order designed to preserve the status of the parties in reference to the property involved. *Stair* v. *Meissel* (1934) 207 Ind. 280, 192 N. E. 453; *Kist* v. *Coughlin* (1936) (Ind. Sup.) 1 N. E. (2d) 602, 4 N. E. (2d) 533; *Vogel* v. *Chapell* (1937) (Ind. Sup.) 6 N. E. (2d) 953.

The appellants were not entitled to a change of venue from the county, since a writ of assistance is a summary proceedings ancillary to the foreclosure action, and does not admit of a trial of any bona fide question as to the right of possession. It is an instrument of the court whereby the purchaser is given full benefit of his purchase by putting

him in possession. Being a summary proceeding, the notice given was sufficient. Formal summons was unnecessary. A court of equity possessed the power to summarily hear the matter in vacation. *Gilliland et al.* v. *Milligan et al.* (1896) 144 Ind. 154, 42 N. E. 1010; *Emerick* v. *Miller* (1902) 159 Ind. 317, 64 N. E. 28; *Rooker* v. *Fidelity Trust Company* (1924) 196 Ind. 373, 145 N. E. 493, 494.

In discussing this question in the Rooker Case, the court used the following language:

> "Upon such an application no question determined by the original decree can be litigated. The only question on the application for a writ of assistance is whether the decree has or has not been complied with, and the defendant in such a case cannot, in defense thereto, renew the contest as to title or right of possession which has already been settled. *Emerick* v. *Miller* (1902) 159 Ind. 317, 64 N. E. 28.
>
> "A writ of assistance is a summary proceeding by which a court of equity will enforce its decree determining the title or right of possession of real estate, without compelling the party entitled thereto to resort to a court of law to recover the same. It being a summary interlocutory proceeding to be determined by the court of equity, which rendered the original decree, the parties are not entitled to a jury trial, nor to a special finding of facts, as was requested by appellants in this case."

(4) Also it may be added that no question is presented by filing a motion for a new trial.

(5) The appellants made objection because the writ of assistance was filed in the original action foreclosing the mortgage in the Adams circuit court, and assert that an action for the recovery of the possession of real estate must be brought in the county were the real estate is located. They are mistaken in this contention, evidently overlooking the fact that the writ is a summary interlocu-

tory proceeding and must be determined by the court of equity which rendered the original decree.

(6) The appellants were not entitled to interpose, as a defense to the writ of assistance, matters which subsequently arose affecting possession of the land. The judgment of foreclosure determined the rights of the parties, and, when the appellants failed to redeem the property, their right of possession was forfeited.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

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